Petition

81-1926

Supreme Court, U.S.
FILED
APR 16 1982
ALEXANDER L. STEVAS
CLERK

NO.

in the Supreme Court of the United States

October Term, 1981

RONALD E. SPEED, RUSSEL F. KEARNEY, and DONALD J. WILLIAMS

Petitioners

vs.

THE STATE OF FLORIDA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

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QUESTION PRESENTED FOR REVIEW

Should the Court address the Fourth Amendment concerns posed by warrantless searches and seizures in the context of "open view" versus "plain view" situations, given the extreme confusion among state and federal courts on that subject, which confusion has had far reaching deleterious effects on the entire criminal justice system?

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THE DECISION BELOW

Review is sought of the decision of the District Court of Appeal of Florida, Fourth District, dated December 9, 1981, rehearing denied January 27, 1982. The decision has not been reported, but a copy is included in the appendix.

JURISDICTION

The Jurisdiction of the Court is invoked under 28 U.S.C. §1257(3). The decision sought to be reviewed was rendered December 9, 1981, rehearing denied January 27, 1981. By an order entered by the Honorable Justice Lewis F. Powell, Jr., on March 24, 1982, the petitioners were granted until April 16, 1982, to file this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves interpretation of the Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS*

At some time prior to August 30, 1979, Agent Rick Look of the Florida Department of Law Enforcement, hereinafter referred to as "FDLE", was furnished information from a then confidential informant, subsequently revealed to be Lee Crowell, that a smuggling venture was going to be conducted in the Lighthouse Point area of Broward County, Florida. Crowell supplied

* The facts were largely agreed to by the litigants in the state appellate court.

Agent Look with the names of three specific vessels and three specific addresses, but Crowell had no knowledge or information with reference to the vessel "Wahoo III" or the address 2731 Northeast 36 Street, Lighthouse Point. The initial information on the "Wahoo III" was received by the Lighthouse Point Police Department from United States Customs Officers CPO's Hill and McGinty. CPO McGinty initially observed the "Wahoo III" enter the Hillsboro Inlet at approximately 11:15 a.m. on August 1, 1979. According to McGinty, the vessel seemed bow heavy and had salt spray around the window area and front section of the vessel. Customs Officers DID NOT conduct continuous surveillance on the "Wahoo III".

Officer Gary Nurkiewicz of the Lighthouse Point Police Department was familiar with the "Wahoo III" because he lived immediately across the canal where the "Wahoo III" was usually moored. Based upon the information supplied by Officer Nurkiewicz, the "Wahoo III" was located and observed by CPO Hill at 2731 Northeast 36th Street, Lighthouse Point, at approximately 3:00 p.m. on August 1, 1979. Surveillance was maintained by Officer Richard Huott of the Lighthouse Point Police Department from approximately 4:00 p.m. on August 1, 1979, and continued until 2:00 a.m. on August 2, 1979. Officer Huott's suveillance position was located in the backyard of Officer Nurkiewicz' home which is across the canal from 2731 Northeast 36th Street. Officer Huott did not observe any suspicious activity, but did observe the occupants of the house watching television. The evidence with regard to the distance between the Nurkiewicz house and the "Wahoo III" is conflicting, but it is believed to be in the vicinity of approximately

200 feet. The surveillance was terminated at approximately 2:00 a.m. on August 2, 1979.

At approximately 3:00 a.m., Agent Look, Officer Nurkiewicz, and Lee Crowell, while sitting on the seawall immediately behind Officer Nurkiewicz' home, observed some activity in the area of the "Wahoo III". It was a dark night. The Petitioners were observed running from the vessel to the house carrying objects. No observations could be made as to the sex, color of skin or any description of the individuals. Moreover, it could not be determined by these observations from across the canal how the objects were packaged or the color of the packages. No marijuana was ever seen in plain view and no odor of marijuana was ever detected. As a matter of fact, with the naked eye, you could not distinguish anything. The confidential informant, Lee Crowell, actually testified that from his vantage point, which was exactly the same as that of Officer Nurkiewicz and Agent Look, he ". . . could see them carrying large objects. What they were I could not actually tell."

During the course of the surveillance, a task force comprised of FDLE, U.S. Customs, Lighthouse Point Police Department, and a contingent of the Fort Lauderdale Police Department had been assembled. This conglomerate included approximately thirty officers, at least three or four official vehicles, and a SWAT team. As the observations were being made from the seawall across the canal from the "Wahoo III", a command decision was made to "hit the house". The task force approached the front of the house in their unmarked vehicles and immediately piled out and ran toward the rear of the residence, approaching the house from the front (south), east and west. Agent Look, Officer

Nurkiewicz and Crowell were due north across the canal with other members of the contingent force. As a practical matter, prior to executing the raid, the house in question was completely surrounded.

When the task force approached 2731 Northeast 36th Street, no attempt was made by any of the petitioners to leave the residence. The only vehicle known to the officers to be at the house was a black Corvette parked in front of the house. The vessel, the "Wahoo III", was moored along side the rear of the residence facing due west. The only exit out of the canal was due east approximately 1700 feet away and could easily have been secured given the manpower and vehicles available to the task force.

The garage area of the house was closed, and it is clear that from outside the house, there was no view of the inside of the garage area. Further, there was never an attempt to move the alleged marijuana from inside the house into any of the vehicles located at the house. It is also clear that the issue of obtaining a search warrant was discussed approximately fifteen (15) minutes before the raid with regard to 2731 Northeast 36th Street.

Based upon the information supplied by the Confidential Informant, Crowell, all four law enforcement agencies had inside subjective knowledge that the Defendants were not going to leave the house or attempt to move the alleged contraband until approximately 8:00 or 9:00 o'clock in the morning. At this time, the marijuana, if any, was to be moved by van (no vans were observed prior to the raid at the 36th Street house) to a shopping center where the van was to be

picked up by someone else, offloaded and returned to the shopping center. All of the objective facts observed by all of the officers who testified at the hearing on the motion to suppress are consistent with the modus operandi of the group as related by the Confidential Informant, Crowell.

The purpose of the large number of manpower was to raid the house in the event *any* activities started. Upon notification of the activity between the house and boat, the raiding party mentioned above hit the house and seized the dark objects which had been carried, and later arrested the Petitioners, SPEED, KEARNEY and WILLIAMS. Customs Officer Jerome Summers arrived after the seizure of the contraband and the arrest of the petitioners and boarded the "Wahoo III" pursuant to 19 U.S.C. 1582. However, it is clear that neither the initial entry into the residence nor the vessel was made pursuant to Customs' authority, but was made pursuant to State officers raiding the house.

Subsequent to the arrest of Petitioner SPEED, he was advised of his constitutional rights pursuant to *Miranda* and executed a waiver of rights form. SPEED subsequently gave a statement to Agent Van Trunk.

The petitioners were charged by Information with trafficking in cannibis, in an amount two thousand pounds or more, but less than ten thousand pounds, contrary to Florida Statute 893.135(1)(a)(ii). The petitioners filed a motion to suppress, alleging that the evidence seized at the time of the arrest was seized in violation of the Fourth and Fourteenth Amendments in the United States Constitution. A hearing was conducted on the motion on August 14, 1980, and denied on that date. In

denying the motion, the state trial court ruled that the objects seized were in plain view. Interestingly, despite denying the motion, the court found that there were no exigent circumstances.

Each petitioner entered a plea of *nolo contendere*, specifically preserving the right to appeal the denial of the motion to suppress. On appeal to the District Court of Appeal of Florida, Fourth District, the petitioners again raised the federal constitutional issue.

On December 9, 1982, the state appellate court affirmed without opinion. The petitioners requested rehearing, or in the alternative to clarify the basis of the opinion. The alternative request was denied by the appellate court on January 27, 1982. This petition follows.

REASONS FOR GRANTING THE WRIT

As Justice Rehnquist noted in *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973), this Court's decisions dealing with the constitutionality of warrantless searches suggest that "this branch of the law is something less than a seamless webb". With the past year, the Supreme Court of Florida has joined other state and federal courts which have grappled with the issues surrounding warrantless searches where seized evidence was in "open view" rather than "plain view". The Court's efforts will be seriously undermined if the decision in the instant case is allowed to stand.[1] This Court should

[1]Because the state appellate court failed to write an opinion to reveal the efficacy *vel non* of its thought processes, the Supreme Court of Florida is without jurisdiction to review the decision. Article V, Section 3(b)3, *Florida Constitution* (1980).

grant its writ of certiorari if for no other reason than to clarify the parameters of the "plain view doctrine" and of its stepchild, the "open view doctrine".

The Supreme Court of Florida originally addressed the problem in *Ensor vs. State*, 403 So.2d 350 (Fla. 1981). In that case, police officers stopped an automobile occupied by the driver and the defendant. Peering through the window of the automobile with a flashlight, one of the officers observed the handle of a pistol protruding from under the passenger side floor mat. The officer entered the vehicle and retrieved the weapon. The prosecution successfully argued at the trial and appellate level that the police officer acted within permissible constitutional limitations because the weapon seized was in plain view. The Supreme Court, while affirming the defendant's conviction, noted that the prosecution, the defense, the trial court and the appellate court had all confused the plain view doctrine with what was in reality "open view". The Court noted that such confusion was not at all unusual, citing many judicial decisions which betrayed similar confusion.[2] The Court quoted at

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[2]*See, e.g., United States v. Rollerson*, 491 F.2d 1209 (5th Cir. 1974); *United States v. Story*, 463 F.2d 326 (8th Cir. 1972); *United States v. West*, 460 F.2d 374 (5th Cir. 1972); *United States v. Drew*, 451 F.2d 230 (5th Cir. 1971); *McGraw v. State*, 387 So.2d 444 (Fla.1st DCA 1980); *Porchay v. State*, 321 So.2d 439 (Fla. 1st DCA 1975); *Christian v. State*, 303 So.2d 405 (Fla. 3d DCA 1974); *State v. Day*, 301 So.2d 469 (Fla. 1st DCA 1974); *People v. Gray*, 37 Mich.App. 189, 194 N.W.2d 545 (1971).

In addition to these cases cited by the Florida Supreme Court, several other state and federal courts have confused the two terms. *United States v. Villoti*, 323 F.Supp. 425 (S.D.N.Y. 1971); *United States v. Ocampo*, 650 F.2d 421 (2d Cir. 1981); *State v. Crea*, 305 Minn. 342, 233 N.W. 736 (1975); *State v. Gott*, 456 S.W.2d 38 (Mo. 1970); *Bres v. State*, 76 Wisc.2d 457, 251 N.W.2d 461 (1977);

length from an opinion of the Maryland Special Court of Appeals which properly defined and distinguished the terms:

> In this context, we studiously avoid the phraseology "in plain view" to avoid any implication that the so-called "plain view doctrine" is being invoked. That doctrine is not here applicable. Needless confusion is frequently engendered by the employment in many opinions of the same phrase—"in plain view"—to describe two visually similar but legally distinct situations. The "plain view doctrine" as described in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022,29 L.Ed.2d 564, refers exclusively to the legal justification—the reasonableness—for the seizure of evidence which has not been particularly described in a warrant and which is inadvertently spotted in the course of a constitutional search already in progress or in the course of an otherwise justifiable intrusion into a constitutionally protected area. It has no applicability when the vantage point from which the "plain view" is made is not within a constitutionally protected area. It is, therefore literarily discreet to use for such latter situations some alternative phraseology such as ["open view"], "clearly visible", "readily observable",

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(Footnote 2 Continued)

Gonzalez v. State, 588 S.W. 355 (Tex.Cr.App. 1979); *In re Deborah C.*, 635 P.2d 446 (Cal. 1981); *State v. Jones*, 283 S.E.2d 483 (N.C. 1981); *People v. Bradford*, 423 N.E.2d 1179 (Ill.App. 1981).

"open to public gaze", etc., rather than to employ the words "in plain view" in their purely descriptive capacity, lest the unwary reader read them in their other and talismanic capacity as an invocation of the doctrine of the same name in nonintrusive situations where it is not applicable.

Scales v. State, 13 Md.App. 474, n.1, 284 A.2d 45,47 n.1 (1971)

More recently, in *State v. Seagull*, 95 Wash.2d 898, 632 P.2d 44 (1981), Supreme Court of Washington, sitting *en banc*, conducted a similar analysis of the problem, and in turn quoted from a decision by the Supreme Court of Hawaii:

> This "open view doctrine" is to be distinguished from the visually similar, but legally distinct, "plain view doctrine". As noted in State v. Kaaheena, 59 Haw. 23, 28-29, 575 P.2d 462, 466-67 (1978):
>
> > In the "plain view" situation "the view takes place *after* an intrusion into activities or areas as to which there is a reasonable expectation of privacy." The officer has already intruded, and, if his intrusion is justified, the objects in plain view, sighted inadvertently, will be admissible.
> >
> > In the "open view" situation, however, the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on

> the outside looking inside to that which is knowingly exposed to the public. *See* Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident"* Geography Battle, 26 Mercer L.Rev. 1047, 1096, 1097 (1975). The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.

(Emphasis by court) *Id.* at 46-47 (citations omitted).

See also, 68 Am.Jur.2d *Searches and Seizures* §§23, 88 (1973); I. W. LaFave *Search and Seizure* §2.2 at 240 (1978)

Continuing its analysis in *Ensor v. State, supra.* the Supreme Court of Florida identified three distinct factual situations in order to properly limit the plain view doctrine espoused in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

> The first factual situation we identify as a "prior valid intrusion". In this situation, an officer is legally inside, by warrant or warrant exception, a constitutionally protected area and inadvertently observes contraband also in the protected area. It is this situation for which the United States Supreme Court created the "plain view doctrine" in Coolidge and held that an officer could constitutionally seize the contraband in "plain view" from within this protected area. We emphasize that it is critical under this doctrine for the officer to be already

within the constitutionally protected area when he inadvertently discovers the contraband.

We identify the second factual situation as a "non-intrusion". This situation occurs when both the officer and the contraband are in a non-constitutionally protected area. Because no protected area is involved, the resulting seizure has no fourth amendment ramifications, and, while the contraband could be defined as in "plain view", it should not be so labeled to prevent any confusion with the Coolidge "plain view doctrine".

The third situation concerns a "pre-intrusion". Here, the officer is located outside of a constitutionally protected area and is looking inside that area. If the officer observes contraband in this situation, it only furnishes him probable cause to seize the item. He must either obtain a warrant or have some exception to the warrant requirement before he may enter the protected area and seize the contraband. As with the non-intrusion situation, the term "plain view" should not be employed here to prevent confusion. For clarity, we label an observation in the latter two non-Coolidge situations as a legally permissive "open view".

Ensor v. State, 403 So.2d at 352.

The court upheld the search in *Ensor* despite the absence of a warrant, finding "exigent circumstances". *Carroll v. United States*, 267 U.S. 132 (1925).

Despite the clarity of its analysis in *Ensor*, the Supreme Court of Florida felt compelled to once again stress the distinction between "open view" and "plain view" in *Adoue v. State*, 408 So.2d 567 (Fla. 1981). In *Adoue*, police officers examined the inside of an airplane through a window with the aid of a flashlight. They observed a number of white plastic garbage bags, one of which bags was torn. Through the tear a green leafy substance was observed. Subsequently the officers entered the plane and seized the bags, which were found to contain marijuana. Once again the Court found that the lower courts had mistakenly relied upon the plain view doctrine to uphold the search. The Court stated that when the officers looked through the window of the plane, they stood in a nonconstitutionally protected area where they had a lawful right to be; thus, the marijuana was observed in "open view". The subsequent warrantless search was upheld, again based upon a finding that exigent circumstances existed. *Adoue v. State, supra* at 571. *Carroll v. United States, supra.*

The common denominator of those decisions which recognize the distinction between "open view" and "plain view" is the very important realization that in an "open view" situation, no intrusion upon a constitutionally protected area has occurred as yet, but that a warrant requirement is necessary *before the police may proceed to invade the protected area.* Conversely, in an "open view" situation, the invasion has already occurred, but it has occurred with justification (a search warrant, emergency, exigent circumstances, etc.). No additional justification is needed for the seizure of items in plain view.

Given this fundamental distinction, and the vast number of courts which have failed to appreciate it, this Court should grant its writ of certiorari to correct the widespread erroneous belief that the distinction is insignificant. Such a belief is apparent in the instant case. The cavilier affirmance by the state appellate court of the petitioners' convictions without an opinion suggests not only a myopic failure to appreciate the carefully analyzed decisions of the Florida Supreme Court in *Ensor* and *Adoue*, but an ostrich-like unwillingness to perform the requisite constitutional analysis.

Without belaboring the facts of the case, it should be beyond cavil that the instant case presents an example of "open view" as opposed to "plain view", the ruling of the state trial court to the contrary notwithstanding. The observations of the police officers were made from a considerable distance from the petitioners and were not made from within a constitutionally protected area. Assuming without conceeding that those observations furnished the officers with probable cause, more was needed to justify the officers' subsequent actions of entering the petitioners' property. In order to satisfy constitutional scrutiny, the actions of the officers must necessarily have been conducted pursuant to a warrant, or within one of the carefully limited exceptions to the warrant requirement. Clearly, the officers did not have a warrant, despite more than ample time to procure one. Just as clearly, the state trial judge was correct in finding that there were no exigent circumstances to excuse the lack of a warrant, and none of the other exceptions to the warrant requirement were even remotely relevant. *See, Coolidge v. New Hampshire, supra; Payton v. New York*, 445 U.S. 573 (1980). The

decision of the trial court to excuse the absence of a warrant on the theory of "plain view" and the decision of the District Court of Appeal of Florida, Fourth District, upholding that decision not only were erroneous but provide this Court with compelling reasons to grant its writ of certiorari in this case. *See* Rule 17, Rules of the Supreme Court of the United States. It is earnestly hoped that this Court will grant certiorari review in this cause and quash the decision of the District Court of Appeal of Florida, Fourth District.

Respectfully submitted,

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Appendix

NO.

in the Supreme Court of the United States

October Term, 1981

RONALD E. SPEED, RUSSEL F. KEARNEY, and DONALD J. WILLIAMS

Petitioners

vs.

THE STATE OF FLORIDA

Respondent

APPENDIX

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SUPREME COURT OF THE UNITED STATES

No. A-825

RONALD E. SPEED, ET AL.,
Petitioners

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 16, 1982.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 24th
day of March, 1982

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 79-6027-CF

THE STATE OF FLORIDA,

Plaintiff,

vs.

RUSSELL FRANCIS KEARNEY
and DONALD JAY WILLIAMS,

Defendants.

MOTION TO SUPPRESS PHYSICAL EVIDENCE

COME NOW, the Defendants, RUSSELL FRANCIS KEARNEY and DONALD JAY WILLIAMS, by and through their undersigned counsel, pursuant to Florida Rule of Criminal Procedure 3.190(h), and respectfully move this Honorable Court to enter an Order suppressing as evidence in this cause, any and all items seized by members of the Lighthouse Point Police Department; United States Customs; Fort Lauderdale Police Department; Florida Department of Criminal Law Enforcement; and/or Agents acting within their control, and particularly those named tangible items contained in the Information and in the State's Answer to Defendants' Demand for Discovery dated September 26, 1979, and particularly as to Paragraph 3, said items being seized as a result of an unlawful search and seizure on August 2, 1979. Aa grounds for the Court's

granting of Defendants' motion in this cause, the Defendants would show the following:

1. All items aforementioned were illegally seized without the benefit of a valid search warrant.

2. There was no probable cause to justify any search and seizure in the above-styled cause.

3. The Defendants did not consent to said search.

4. Said search was not incident to a lawful arrest and the evidence seized thereby represents the "fruit of the poisonous tree". *Wong Sun vs. United States*, 371 U.S. 407 at 488 (1963).

5. The search and seizure conducted by members of Lighthouse Point Police Department, United States Customs, Fort Lauderdale Police Department, Florida Department of Criminal Law Enforcement, and/or Agents acting within their control, was beyond the scope of that permitted when incident to a lawful arrest. *Chimmell vs. California*, 395 U.S. 752 (1969). In fact, the search occurred prior to any arrest of the Defendants.

6. There was sufficient opportunity to obtain a search warrant for said search.

7. The connection between the unlawful search and the discovery of evidence sought herein to be suppressed has not become sufficiently attenuated as to dissipate the taint of the original lawless conduct of the Lighthouse Point Police Department, United States Customs, Fort Lauderdale Police Department, Florida Department of Criminal Law Enforcement, and/or Agents

acting within their control. *Nardone vs. United States*, 308 U.S. 338, 341 (1939); *Wong Sun vs. United States*, 371 U.S. 407, 487 (1963).

As further grounds for this motion, the Defendants by and through their undersigned counsel, would show the following reasons for suppression of the aforementioned evidence together with a general statement of the facts upon which this motion is based as required by *State vs. Butterfield*, 285 So.2d 626 (4 DCA 1973):

STATEMENT OF FACTS

On August 1, 1979, a vessel described as a 42 foot Hatteras, named Wahoo III, was seen docked behind a residence located at 2731 N.E. 36th Street, Lighthouse Point, Florida. Officers from the Lighthouse Point Police Department believed that the vessel was carrying contraband. Surveillance was setup near the residence across the canal and both the vessel and the residence were observed for several hours. The vessel did not appear to be unusual as it sat in the water, nor was there anything unusual about the residence in question. As a matter of fact, there was no information whatsoever possessed at the time of the original surveillance concerning the Wahoo III or the residence at 2731 N.E. 36th Street.

For several hours the vessel and residence were observed from a house owned by Officer Nurkiewicz of the Lighthouse Point Police Department, located across the canal from where the Wahoo III was docked. There was no activity observed from the vessel or the residence

until approximately 4:00 A.M., the morning of August 2, 1979. At that time all lights in the residence were out and nothing at all could be seen. However, with the use of binoculars, the officers were able to observe individuals leaving the house and walking to the boat. These individuals could be seen carrying what appeared to be large objects, rectangular in shape, from the boat to the house.

After making these observations from across the canal, one of the officers radioed to a stakeout which was located across the street from the residence at 2731 N.E. 36th Street. The broadcast over the radio was "Move in now". Nothing else was said.

After receiving this broadcast several officers from the Lighthouse Point Police Department, Fort Lauderdale Police Department, and U.S. Customs, left the stakeout, crossed the street and without the benefit of a search warrant, immediately entered the rear yard of the residence at 2731 N.E. 36th Street. At that time the three defendants were arrested.

Subsequent to making these arrests, members of the aforementioned departments, without the benefit of a search warrant, conducted an exploratory search of the residence, boat and packages, and found what they believed to be marijuana.

WHEREFORE, the Defendants respectfully request this Honorable Court to grant this Motion to Suppress Physical Evidence and/or any and all evidence obtained,

procured, or otherwise gained by the aforementioned departments.

Respectfully submitted,

/s/ Peter F. K. Baraban
PETER F. K. BARABAN,
ESQUIRE
Attorney for Defendants
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371-2566 Dade
467-3477 Broward

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Suppress Physicial Evidence was mailed to the Office of the State Attorney, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida 33301, this 20th day of February, 1980.

/s/ Peter F. K. Baraban
PETER F. K. BARABAN,
ESQUIRE

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 79-6027-CF (Judge Futch)

STATE OF FLORIDA,

Plaintiff,

vs.

RONALD E. SPEED,

Defendant.

MOTION TO SUPPRESS CONFESSION OR ADMISSION

COMES NOW the Defendant, RONALD E. SPEED, by and through his undersigned attorney, and files this, his Motion to Suppress a Confession or Admission illegally obtained, pursuant to Rule 3.190(i) of the Florida Rules of Criminal Procedure, and as grounds would show:

1. In the early morning hours of August 2, 1979, the Defendant was arrested and charged with trafficking in cannabis in an amount of two thousand pounds or more but less than ten thousand pounds, contrary to Florida Statute 893.135.

2. Subsequently, the Defendant was transported to the Lighthouse Point Police Department where he was interrogated by Agent Manny Funes and Agent

John Van Tronk of the Florida Department of Law Enforcement.

3. It is submitted that the Defendant's arrest and subsequent search and seizure that resulted in the confiscation of the cannabis aforementioned took place approximately one-half hour prior to the in-custody interrogation.

4. It is further submitted that the arrest of the Defendant and seizure of the contraband was illegal, and in violation of the Defendant's Constitutional rights under the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

5. That the Defendant's confession or admission was so tainted by the Constitutional violations aforesaid that the confession or admission becomes the fruit of the poisonous tree as recognized in *Wong Sung v. United States*, 371 U.S. 471 (1963).

6. It is submitted that the Defendant's confession must be suppressed as the Defendant could not be effectively appraised of his Miranda rights given the existence of his illegal arrest and the subsequent illegal search and seizure of the cannabis aforementioned.

7. The Defendant's confession was therefore fatally poisoned by the initial unconstitutional acts of the State officers and there was not a sufficient break in the action thereafter to purge the illegal taint from the confession to make the confession independently admissible. *Brown v. Illinois*, 95 Sup. Ct. 2254 (1975).

WHEREFORE, the Defendant respectfully moves this Honorable Court for an Order Suppressing any and all statements or confessions made by the Defendant pursuant to the custodial interrogation of the Defendant by State officers.

LAW OFFICES OF MICHAEL H. BLOOM
Attorney for Defendant
2699 South Bayshore Drive
Suite 600-C
Coconut Grove, Florida 33133
BY: /s/ Michael H. Bloom
MICHAEL H. BLOOM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion was mailed this 8th day of August, 1980, to MARK SPISER, ESQUIRE, Office of the State Attorney, 600 Broward County Courthouse, 201 S. E. 6th Street, Ft. Lauderdale, Florida, 33301.

BY: /s/ Michael H. Bloom
MICHAEL H. BLOOM

[FILED 8/13/80]

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 79-6027-CF (Futch)

THE STATE OF FLORIDA,

Plaintiff,

vs.

RONALD E. SPEED, et al,

Defendants.

SUPPLEMENTAL MOTION TO SUPPRESS TANGIBLE EVIDENCE AND MEMORANDUM OF LAW

COMES NOW the Defendant, RONALD E. SPEED, pursuant to Rule 3.190(h) of the Florida Rules of Criminal Procedure, and files this, his Motion to Suppress certain tangible evidence seized from him and states as his reason that the evidence was illegally seized without a warrant.

THE RELIEF SOUGHT

Defendant, RONALD E. SPEED, seeks suppression and exclusion of the marijuana which is the subject matter of the charge against him, and which was seized from him by agents of the State of Florida on or about

August 2, 1979. The Defendant's claim for relief is grounded on the Fourth Amendment to the United States Constitution[1] and Article I, Section 12 of the Florida Constitution.[2]

THE FACTS

Most of the events leading up to the arrest of the Defendant, SPEED, and the co-defendants, and the subsequent seizure of the marijuana are undisputed since, to a large extent, those events are unknown to the Defendant and only discovered by the Defendant in the course of his pre-trial discovery.

On or before August 1, 1979, agents of the Florida Department of Law Enforcement (F.D.L.E.) received information from a then confidential source, Lee Crowell a/k/a John Jacobs, that a certain smuggling organization headed by John Giles, was going to smuggle large quantities of marijuana into Broward County by the use of three or four large seagoing vessels.[3]

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[1]The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment is applicable to the states. *Mapp v. State*, 367 U.S.643 (1961).

[2]Although similar to the Fourth Amendment to the United States Constitution, Florida's protection against unreasonable search and seizure has a built-in exclusionary rule: "Articles or information obtained in violation of this right shall not be admissible in evidence." Art. I, §12.

[3]Deposition of Rick Look, page 14-16.

Agent Look was advised that the modus operandi to be followed by the Giles organization was that, if the vessels went out of the inlet the previous day, they would return the following day laden with pot.[4] Agent Look was further advised by Crowell of the possible names of the vessels and the addresses at which they were presently moored and subsequently to be off-loaded.[5]

At this time, various law enforcement agencies conducted an in-depth surveillance operation on the vessels and addresses supplied by the confidential informant, Crowell. On or about July 31, 1979, one of the vessels supplied by Crowell, the Miss Candee, left Lighthouse Point and headed south on the Intracoastal Waterway. This vessel was surveilled by United States Customs.[6] According to Crowell, the smuggling operation had commenced.

Since the information supplied by Crowell was incomplete, all law enforcement agencies were looking for any boats of comparative size, leaving at a given time, that may be in association with the Miss Candi.[7]

The vessell, Wahoo III, a forty-two foot Hatteras sport fisherman, similar to the Miss Candi, was initially spotted on the afternoon of August 1, 1979, in the

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[4]Deposition of Rick Look, page 15-16.

[5]Deposition of Rick Look, page 18.

[6]Deposition of Ronald C. McGinty, page 10.

[7]Deposition of Rick Look, page 20.

canals of Lighthouse Point not far from where the Miss Candi was initially spotted.[8] It should be emphasized that prior to spotting the Wahoo III, no law enforcement agency had any information concerning the name Wahoo III or the address at which it was docked.[9]

After the Wahoo III was initially spotted on the afternoon of August 1, 1979, surveillance was established at each address. Crowell had previously advised that the boats would stay moored with no activity around them throughout the entire day of August 1st, and then at approximately 1:00 a.m. the marijuana would be off-loaded.[10] Officer Richard Huott of the Lighthouse Point Police Department was assigned the duty of surveilling the residence of 3731 N. E. 36th Street, the address where the Wahoo III was docked. Huott commenced his surveillance from approximately 4:30 p.m., on August 1st to 2:00 a.m., on August 2nd, without observing any unusual activity.[11] Surveillance on the Wahoo III was maintained from across the canal and was terminated from approximately 2:00 a.m., on August 2nd until 3:30 a.m., on August 2nd.

At approximately 3:30 a.m., on August 2nd, Officer Huott arrived back at the surveillance house and again

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[8]Deposition of Rick Look, page 21-22.

[9]Deposition of Rick Look, page 14, 20-22; Deposition of Malcolm James, page 20. Agent Look specifically states at line 5 on page 21, "I have received no information from the Wahoo III".

[10]Deposition of Rick Look, page 25-26.

[11]Deposition of Richard Huott, page 10.

commenced surveillance of the Wahoo III.[12] After a short time the surveillance officers observed activity in the rear of 3731 N. E. 36th Street around the Wahoo III. It should be noted that these observations were made at night from a distance of about 200 to 250 feet.[13]

According to Officer Gary Nurkiewicz, a surveillance officer for Lighthouse Point, he observed some activity with the aid of binoculars and observed large, square or oblong objects that "looked like" bales of marijuana. However, Nurkiewicz could not tell how these objects were packaged (boxes or burlap) the color of these objects, nor did he observe any marijuana or marijuana residue in plain view and could not smell anything from where he was.[14]

Based upon the foregoing, Nurkiewicz advised all other law enforcement agencies that were in the area to "hit the house". It is important to note that after these observations and *before* the house was "hit" all surveillance officers went back to the police station to get their equipment i.e. their radios, their guns, their other men. According to Huott, "at that point, everybody that was involved, drove down in a caravan from the police department to 3731 N. E. 36th Street [and] . . . "hit the house".[15]

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[12] Deposition of Richard Huott, page 14.

[13]Deposition of Richard Huott, page 8; Deposition of Malcolm James, page 15-18.

[14]Deposition of Gary Nurkiewicz, page 30-34.

[15]Deposition of Richard Huott, page 21.

In all, there were representatives from F.D.L.E., City of Fort Lauderdale Police Department, City of Lighthouse Point Police Department and United States Customs. There were approximately a dozen men from all agencies in four or five cars.[16] According to one version of the "HIT", officers converged from the front of the house and from the east side and from the west side. There was also a group of surveillance officers surveilling the entire situation from the south or across the canal.[17]

According to the pre-trial depositions, there were two of the Defendants' cars parked in front of the house at the time the caravan arrived, a black Corvette and a Toyota Celica. No other vehicles could be observed.[18]

As a result of the "hit", the Defendant SPEED and co-defendants KEARNEY and WILLIAMS were arrested and evidence was seized and confiscated including, but not necessarily limited to, the marijuana, the vessel Wahoo III, and other miscellaneous personal property. It is this evidence that the Defendant SPEED seeks to suppress and exclude from evidence at trial. For purposes of this Motion only, the Defendant SPEED concedes that the substance seized from him at the time of his arrest was cannabis.

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[16]Deposition of Richard Huott, page 21.

[17]Deposition of Richard Huott, page 22.

[18]Deposition of Russell Smith, page 25; deposition of Cherokee McDonald, page 42; deposition of Richard Huott, page 23.

PREMISES

(1) This was a warrantless search, and:

> [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment sub—*only* to a few specifically delineated exceptions . . . [T]he burden is on those seeking the exemption to show the need for it. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 29 L.Ed.2d 564, 576 (citations omitted). See also *Raleigh v. State*, 365 So. 2d 1048 (Fla. 4th DCA 1978); *Ingram v. State*, 364 So. 2d 821 Fla. 4th DCA 1978); *Sheppard v. State*, 343 So. 2d 1349 (Fla. 1st DCA 1977); *Mann v. State*, 292 So. 2d 432 (Fla. 2d DCA 1974.[19]

(2) There are six exceptions to the Fourth Amendment's warrant requirement:

a. In 'plain view' see *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971);

b. With 'consent' voluntarily, intelligently and knowingly given, see *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968); *Johnson v. Zerbst*, 304 U.S. 458, 88 S.Ct. 1019, 82 L. Ed. 1461 (1938);

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[19]"Ultimate burden of proof as to the validity of a warrantless search is on the state . . ." *Mann v. State*, 292 So. 2d 432 (Fla. 2d DCA 1974).

c. As 'incident to a lawful arrest', see *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L. Ed. 2d 668 (1960); *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L. Ed. 2d 327 (1959).

d. In 'hot pursuit' or 'emergency' situations, see *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1947);

e. Where 'exigent circumstances' exist coincidental with 'probable cause' (as in the case of movables see *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed. 2d 419 (1970); and

f. In 'stop and frisk' situations, see *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d889 (1968).

THE LAW

A. Border Search

It is axiomatic that a search is not a valid border search unless it appears by a preponderance of the evidence, direct or circumstantial, that a border crossing has occurred. U.S. Customs has authority, purusant to Title 19 U.S.C. § 482 to conduct border searches given a "reasonable cause to suspect there is merchandise which was imported contrary to law. . . ." Furthermore, under Title 19 U.S.C. 1581(a) Customs has absolute authority to stop or search vessels in "Customs waters" for the purpose of examining the vessels papers/documents and/or safety check.[20]

[20] *United States v. Freeman*, 579 Fed. 2d 942 (5th Cir. 1978)

The law aforementioned is clear under both of the aforementioned authorities, however, the burden is on the State to show that (1) there existed a reasonable suspicion that the vessel crossed an international border or had been in contact with those who have done so; (2) that there has been continuous and uninterrupted surveillance so as to convince the trier of fact with reasonable certainty that there has been no change in condition from the border to the stop/search and whatever was in the vessel when stopped and searched was in the vessel at the border.[21]

In the case sub judice the record is completely void of any objective standard that would give rise to a reasonable suspicion that the Wahoo III had ever crossed an international border. The confidential informant, Crowell, had supplied the agents with the names of three vessels, to wit: the Havelock, the Jon-Jon, and the Miss Candi and the addresses that they would be docked at. The Wahoo III was not mentioned nor was the address of 3721 N. E. 36th Street given to the agents.[22]

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[21]*U.S. v. Fogelman*, 586 Fed. 2d 337 (5th Cir. 1978); *U.S. v. Woodard*, 531 Fed. 2d 741 (5th Cir. 1976); *U.S. v. Storm*, 480 Fed. 2d 701 (5th Cir. 1973).

[22]Deposition of Rick Look, page 20-23; 32, 33. Agent Look specifically states that he received no information on the Wahoo III but simply was looking for any boat of comparative size. In checking the canals, not far down the road from the supplied address is where they found the Wahoo III. It was initially spotted the afternoon of August 1st tied behind the address on 36th Street.

Furthermore, under the doctrine of extended border search, if there is a border crossing, there must be continuous and constant surveillance of the vessel from the border to the stop.[23] In the instant case, there is no evidence of when the Wahoo III crossed the international border, if, in fact, it ever did.[24] Moreover, not only did the agents not know when the Wahoo III returned, the surveillance on the Wahoo III did not commence until approximately 4:30 p.m., on August 1, 1980, and was interrupted for approximately an hour and a half on August 2, 1980, prior to the arrest.[25]

It is therefore abundantly clear that the State cannot maintain its burden of showing by a preponderance of evidence that the Wahoo III was ever engaged in a border crossing and, further, that given the totality of the circumstances of the unknown departure and arrival dates and interrupted surveillance once it began, the State cannot come under the doctrine of extended border search.[26]

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[24]*U.S. v. Fogelman, supra; U.S. v. Mitchell,* 525 Fed. 2d 1275 (5th Cir. 1976); *U.S. v. Brennan,* 538 Fed. 2d 711 (5th Cir. 1976).

[25]Deposition of Richard Huott, page 10.

[26]*U.S. v. Johnson,* 588 Fed.2d 147 at 154 (5th Cir. 1979). A particular search removed from the border *may* be the functional equivalent of the border search if the object of the search has been kept under constant surveillance from the border to the point of the search. [Emphasis added]. See also *Almeida-Sanchez v. U.S.* 413 U.S. 266 (1973).

The State cannot justify the instant search under Title 19 U.S.C. § 1581(a).[27] Customs waters has been defined by Title 19 § 1401 (j) as "the waters within four (4) leagues [twelve nautical miles] of the Coast of the United States". Under the facts of the instant case, the Wahoo III was clearly not in "Customs waters" but *docked* in a canal off of the inland waterway. Additionally, the vessel had been docked for almost twenty-four hours prior to the search.[28]

The search in question cannot be justified under Section 1581(a) because factually, no Customs officer or any other officer for that matter *ever requested* to examine the ship's manifest or other documents or safety equipment.[29]

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[27]*U.S. v. Jones*, 528 Fed. 2d 303 (9th Cir. 1975); *U.S. v. Brennan*, 538 Fed. 2d 711 (5th Cir. 1976); *U.S. v. Ingham*, 502 Fed. 2d 1287 (5th Cir. 1975). Any officers of the Customs may at any time go on board any vessel or vehicle at any port in the United States or within Customs waters . . . and examine the manifest and other documents [emphasis added] and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package or cargo on board and to this end may hail and stop such vessel or vehicle and use all necessary force to compel compliance.

[28]Deposition of Sgt. Cherokee McDonald, page 30-31. Sgt. McDonald testified that he was the first officer on the scene and he and numerous other officers responded to a radio broadcast by either Lt. James or Sgt. Nurkiewicz of the Lighthouse Point Police Department that "they were unloading and that's where they are, so let's *hit* them. [Emphasis added.]

[29]See also *U.S. v. Fogelman*, *supra*, page 343.

B. EXIGENT CIRCUMSTANCES?

The rationale for the exigent circumstances exception to the warrant requirement of the Fourth Amendment is founded in the decision of *Carroll v. U.S.*, 267 U.S. 132 (1924). *Carroll* holds a search warrant unnecessary where there is probable cause to search an automobile/airplane/vessel (moveables). In *Carroll*, the car was moveable, the occupants alerted, and the cars contents may never be found again if a warrant must be obtained.[29] The Supreme Court in *Payton v. New York*, ____ U.S. ____ (decided 4/15/80) recently held that, absent exigent circumstances, police officers may not forcibly enter a suspect's home unless they had previously obtained a warrant. It has long been established that those seeking the exception must show the need.[30] Furthermore, the exceptions to the warrant requirement are narrowly drawn.[31]

It should be noted that the Supreme Court of the United States has *never* approved a warrantless entry of premises to prevent *eminent* destruction or removal of evidence. Entry will only be justified when the exigency is *absolutely compelling* and the destruction is certain. [emphasis added][32]

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[30]*U.S. v. McDonald*, 335 U.S. 451 (1948); *U.S. v. Jeffers*, 342 U.S. 48 (1951).

[31]*Ker v. California*, 374 U.S. 23 (1963); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

[32]*U.S. v. McDonald, supra; U.S. v. Jeffers, supra.*

In *Vale v. Louisiana*, 399 U.S. 30 (1970) the Supreme Court refused to justify a warrantless entry of a home and seizure of evidence because "the goods ultimately seized were not in the process of destruction." This conclusion was reached notwithstanding that in *Vale, supra*, the relatives of the Defendant were in the house and were alerted to the fact that Vale had been arrested outside his home while engaged in a drug transaction.

The important issue under the exigency exception is that the officers must show that it was not realistically feasible for them to have obtained a warrant prior to entering the suspect premises to make the arrest.

Using an objective standard, the officers had the house and vessel under surveillance since 4:30 p.m., on August 1, 1980, and therefore had approximately twelve hours before any activity commenced to notify the State Attorney as to their information and put into operation the mechanics of drafting the affidavit in support of the search warrant for a judge to subsequently execute. Furthermore, the vessel was, as a practical matter, landlocked.[33]

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[33]The Wahoo III was tied up facing west in a finger canal off of the inland waterway. The *only* escape back to the inland waterway and high seas was a narrow opening of this canal into the inland waterway which was approximately 500 yards due east of where the Wahoo III was docked. Therefore, to effectuate an escape the the Defendants would have had to board the Wahoo III, untie the vessel, push off the seawall, and make a U-turn in a narrow canal and proceed through that narrow mouth of the canal into the inland waterway.

In addition, the only two vehicles at the residence of 3721 N.E. 36th Street, were a Corvette and a Toyota.[34] It is submitted that these vehicles are not customarily used to transport large quantities of marijuana. Further, none of the Defendants were alerted to the fact that they were being surveilled and no one's safety was in jeopardy.

The police had sealed off any escape routes as there were policemen on the east side of the house, the west side of the house and in front of the house. There were approximately four or five police vehicles in the immediate area and approximately twelve officers from all agencies.[35] Also, Rick Look and Gary Nurkiewicz were observing all of the activity from the original surveillance point directly across the canal from where the Wahoo III was docked.

The aforementioned facts were the "objective" facts known to the officers immediately prior to "hitting" the house. However, using a subjective standard to determine exigent circumstances, the officers had a great deal more on which to base their decision. The confidential informant, Crowell, had advised Special Agent Look of the modus operandi of this group of smugglers that he had inflitrated. Crowell had specifically advised that the marijuana would be off-loaded during the early morning hours and subsequently moved during

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[34]Deposition of Richard Huott, page 33.

[35]Deposition of Richard Huott, page 21.

early morning rush-hour traffic to avoid undue observation.[36]

The Fourth D.C.A. in *Rizzo v. State*, So. 2d (4th D.C.A. 1980) [1980 F.L.W. 468] considered a case almost exactly on point. In *Rizzo*, the police had no subjective standard similar to the one sub judice. In addition, a van was backed up to the house "which could be used to make a getaway." The District Court held that exigent circumstances must be perceived by the police *prior* to the entry onto private premises. [Emphasis added]. In addition the vehicle could not have gotten away while an officer was absent procuring a search warrant as the police had all avenues of departure covered. Accordinly, the Court found an absence of exigent circumstances and reversed the trial Court.[37]

It is submitted that in the case at bar the burden is on the State to prove that probable cause existed and, exigent circumstances neccesitated the warrantless entry to arrest the Defendant and seize the tangible evidence. It is submitted that given all of the knowledge and information that was available to the police, the manpower and surveillance units that were deployed in the area, the fact that the police had at least twelve hours of surveillance prior to the "hit" and knew that they had approximately four more hours before the marijuana would be moved and that no Defendant was alerted or anyone's safety in danger, that no exigency

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[36]Deposition of Stephanie Wright, page 12.

[37]See *State v. Santamaria*, ____ So. 2d ____ (1st D.C.A. 1980); [1980 F.L.W. 1319] *U.S. v. Fogelman*, *supra*.

existed as a matter of objective or subjective fact or law and therefore a warrant was required prior to entry onto the premises to effectuate the arrests and seizures.

C. PLAIN VIEW

The plain view doctrine as defined in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) consists of three basic requirements that must be satisfied in order for a valid seizure of evidence to result from a plain view observation conducted without a warrant. These requirements are aptly set forth in *Pomerantz v. State*, 372 So. 2d 104, 110 (Fla. 3rd D.C.A. 1979):

> "In a long line of cases, the Florida and Federal Courts have held that it is not a search for the police to discovery evidence in plain sight. The warrantless seizure of such evidence is Constitutionally permissible providing three requirements are met:

(1) The police must observe the evidence in plain sight without the benefit of a search [i.e., without invading one's reasonable expectation of privacy;

(2) The police must have a legal right to be where they are when they make the plain sight observation, and;

(3) The police must have probable cause to believe that the evidence seen constitutes contraband, or instrumentalities or evidence of a crime.

Under the facts and circumstances of the instant case, the surveillance officers were observing the Defendants' activity in the area of the Wahoo III at nighttime from across the canal at a distance of approximately two hundred feet.[38]

According to one surveillance officer, Gary Nurkiewicz, he could not describe the individuals as to height, weight, color of clothing, etc., even with the use of binoculars. Furthermore, all Nurkiewicz observed was that the individuals were carrying large, square oblong objects. He could not describe the color of the objects or how they were packaged.

Agent Look, the only other surveilling officer, observed three males carrying objects or large bales and specifically stated that he *did not* have any confidential information concerning the Wahoo III.[39] His observations were similiar to those of Nurkiewicz in that Look observed large bales that could not be distinguished as to color. The most revealing deposition on the plain view issue is that of the confidentia! informant, Crowell, who was the third person on the seawall observing the alleged off-loading. Crowell, an admitted smuggler, testified that he could not see what was being off-loaded.[40]

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[38]Deposition of Gary Nurkiewicz, page 28-35.

[39]Deposition of Rick Look, page 30-37.

[40]Deposition of Lee Crowell, page 113. Crowell testified as follows: Q. "Could you see what the color of the bales were?" A. "No." Q. "So you really had no idea what they were. Is that correct?" A. "That is correct." Q. "You couldn't smell anything?" A. "No."

Recent decisions have held that a police officers observations of the outer packing of a suspected marijuana, standing alone, is insufficient to constitute probable cause.[41]

In *Morsman v. State*, 360 So. 2d 137 (Fla. 4th D.C.A. 1978) marijuana plants were observed growing in Defendant's backyard. The Court held that marijuana plants growing in plain view in a backyard of a Defendant's residence were seized from a zone closed by reasonable expectation of privacy and therefore the Fourth Amendment.

In *Morsman*, the Court adopted the rule of *Coolidge v. New Hampshire, supra*, in that plain view alone is never enough to justify the warrantless seizure of evidence; for if "reasonable expectation of privacy" dissipates upon "plain view", then every warrantless intrusion following a "plain view" observation is lawful. The Court went on to hold that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Even where the object is contraband, the Fourth D.C.A. has repeatedly stated and enforced the basic rule that police may not enter and make warrantless seizures.[42] The Defendant herein relies on the doctrine of *United States v. Kim*, 415 Fed. Supp. 1252 (U.S.D.C. D. Hawaii 1976). In *Kim*, Government agents had a right to be where they were during their

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[41]*Harris v. State*, 352 So. 2d 1269, 1270 (Fla. 2d D.C.A. 1977); *Carr v. State*, 353 So. 2d 958, 959 (Fla. 2d D.C.A. 1978).

[42]*Hornblower v. State*, 351 So. 2d 716, (Fla. 1977); *Fixel v. Wainwright*, 492 Fed. 2d 480 (5th Cir. 1974).

surveillance of *Kim* in his apartment. However, the Government used artificial viewing aids to enhance their vision, to wit: binoculars and a telescope. *Kim* was observed and based upon those observations the Government was able to show probable cause for a Court-approved wire intercept order.

The *Kim* Court equated the sophisticated visual aids available to the Government to those sophisticated electronic surveillance aids used by the Government in wire and oral intercept cases. See *Katz v. United States*, 389 U.S. 347 (1967). A plain view of the backyard of 3721 N. E. 36th Street and of the Wahoo III, given the darkness and distance, was impossible; only an *aided* view could penetrate. The Court in *Kim, supra*, held that "plain" in plain view must be interpreted as permitting only an unaided plain view. Therefore, the District Court suppressed all evidence that was derived solely from the telescopic surveillance of *Kim's* apartment. The Defendant in the case sub judice adopts the rationale of *U.S. v. Kim, supra*, and the supporting authorities and urges this Court that, since the *Katz* decision, the concept of curtilage and the presence or absence of a physical intrusion have "no Constitutional significance" in determining whether or not a search has taken place.

It is therefore submitted that the telescopic observation made by Nurkiewicz and Look must be suppressed as they are tantamount to a search. Without

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"Accord, *People v. Arno*, 90 Cal. App. 3rd 505 (1979); *U.S. v. Fisch*, 474 Fed. 2d 1071, 1078 (9th Cir. 1973); *Ponce v. Craven*, 409 Fed. 2d 621, 625 (9th Cir. 1969).

these observations, there is no issue as to probable cause and plain view, and the Defendants Motion to Suppress must be granted.

Respectfully submitted,

LAW OFFICES OF
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854-1531

BY: /s/ Michael H. Bloom
MICHAEL H. BLOOM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was delivered to:

MARK SPISER, ESQUIRE
State Attorney's Office
700 Broward County Courthouse
Ft. Lauderdale, Florida 33301

PETER F.K. BARABAN, ESQUIRE
950 South Miami Avenue
Miami, Florida

JOSEPH KELINSON, ESQUIRE
2699 South Bayshore Drive—Suite 400B
Coconut Grove, Florida 33133

this 13th day of August, 1980.

BY: /s/ Michael H. Bloom
MICHAEL H. BLOOM

State of Florida)
) SS. M. Daniel Futch, Jr., J.
County of Broward)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT

No. 79-6027 ABC

Plaintiff,

vs.

RONALD EDWARD SPEED, RUSSEL FRANCIS KEARNEY and DONALD JAY WILLIAMS,

Defendants.

Proceedings had and taken before the Honorable M. Daniel Futch, Jr., one of the judges of said court, at the Broward County Courthouse, Room 840, commencing at or about 9:30 a.m., Thursday, August 14, 1980, in the City of Fort Lauderdale, County of Broward, State of Florida, and being closing arguments of counsel and findings of the Court, pages 3 to 28.

APPEARANCES:

MARK SPEISER
Assistant State Attorney
appearing on behalf of the State of Florida

MICHAEL H. BLOOM, ESQ.
appearing on behalf of Defendant, Speed
Hy Shapiro, Esq., Co-Counsel

JOSEPH H. KELINSON, ESQ.
appearing on behalf of Defendants, Kearney and Williams

Lastly, there is a line of cases that stand for the proposition that it is not illegal entry for a trespass for a police to enter on private property during a lawful performance of their duty. The police were in fact conducting a lawful performance of their duty by going ahead and arresting these three gentlemen without a warrant, based upon their observations on the evening in question. Those cases in that line—I will cite, Your Honor, U.S. vs. Knight, a Fifth District opinion at 451 So.2d 275, more specifically Page 278 and two other cases in that vein, Your Honor, are State of Florida vs. Belcher at 317 So.2d 842 and State vs. Roker at 290 So.2d 525.

The last point I would make, Your Honor, even though there may not have been a van observed from the outside of the house, it is understandable under the circumstances that the house in question had a garage, and the testimony indicates that the van may very well have been parked in the garage, and the testimony indicates there was in fact a van parked in the garage and even though there may not have been any bales of marijuana in the van at that time, it is apparent they had a van there and it was at their disposal for immediate transportation.

THE COURT: That wasn't immediately apparent after they made their entry. Let me put everybody at ease. I will deny the Motion to Suppress. I am not—I think the Customs deal is just like you said. This was a long case. There is no Customs search, but they had the drug information. The drug deals were going on that day. The Customs officers say the Wahoo III was heavy, coming in about the same time, they had the other boats, they had the information, they had plain

view from across the canal. I think they had probable cause to arrest at that moment. They arrested the people out in the yard and had a plain view from the yard then and made the arrest into the house and I think it is reason to search the house for additional personnel because of the safety situation. Motion denied.

MR. BLOOM: Would Your Honor make a finding as to exigent circumstances?

THE COURT: I don't think there are any exigent circumstances. I think I agree, they could have blocked off that whole city of Lighthouse Point with the help they have. For your information, we have got 48 judges in this county.

MR. BLOOM: It has grown since I was a regular here.

THE COURT: Thirty-three circuit and 15 county and three more circuit judges the first of the year. We have judges running out of our ears.

[NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FOURTH DISTRICT
JULY TERM 1981

CASE NO. 80-1449.

RONALD E. SPEED, RUSSEL
FRANCIS KEARNEY, and
DONALD JAY WILLIAMS,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

Decision filed December 9, 1981

Appeal from the Circuit Court
for Broward County;
M. Daniel Futch, Jr., Judge.

Michael H. Bloom of Law Offices
of Michael H. Bloom, Coconut
Grove, and Hy Shapiro of Law
Offices of Hy Shapiro, Miami,
for appellants.

Jim Smith, Attorney General,
Tallahassee, and Max Rudmann,
Assistant Attorney General,
West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

GLICKSTEIN and HURLEY, JJ., GREEN, OLIVER L., Associate Judge, concur.

IN THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

CASE NO. 80-1449

RONALD E. SPEED, RUSSELL FRANCIS KEARNEY and DONALD JAY WILLIAMS,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR CLARIFICATION OF DECISION

COMES NOW the Appellants, RONALD E. SPEED, RUSSELL FRANCIS KEARNEY and DONALD JAY WILLIAMS, and respectfully move this Honorable Court pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, to rehear their appeal and/or to clarify its decision, and in support of this Motion, the Appellants would show:

On November 30, 1981, a panel of this Court heard oral argument in this appeal. The judges were the Honorable Hugh S. Glickstein, the Honorable Daniel T. K. Hurley and the Honorable Oliver L. Green, Associate Judge. On December 9, 1981, the aforementioned panel of this Court issued a *per curiam* order affirming Appellants' convictions. The judges that were listed on the *per curiam* order were the same judges that were present for oral argument. No actual opinion, explanation

or statement of reasons supported this summary disposition. A copy of the panel's opinion is marked Appellants' Exhibit "A", attached hereto and incorporated herein.

Prior to this panel's opinion, but subsequent to oral argument, the Supreme Court of Florida decided *Adoue vs. State*, ____ So.2d ____ (Fla. 1981) [1981 FLW 646]. The Court in *Adoue, supra*, adopted its earlier position in *Ensor vs. State*, ____ So.2d ____ (Fla. 1981) [1980 FLW 374], with regard to the plain-view doctrine as an exception to the warrant requirement of the Fourth Amendment as described in *Coolidge vs. New Hampshire*, 403 U.S. 443 (1971). Plain view as defined by the Florida Supreme Court applies when an officer observing contraband is legally *inside*, by warrant or warrant exception, *a constitutionally-protected area*, when he inadvertently observes contraband within the protected area. *Adoue, supra*, at P-647. [Emphasis added]. *Adoue, supra*, held quite explicitly that an officer may constitutionally seize contraband in "plain view" from the constitutionally-protected area.

The Supreme Court had previously addressed an "open-view" situation in *Ensor, supra*. The police in *Ensor* saw a firearm in "open view" through an open car. The Court ruled that this viewing gave the officers probable cause to believe that a felony was being committed, to wit: carrying a concealed firearm. In *Ensor, supra*, the Court held that the open-view situation occurs when an officer is located *outside a constitutionally-protected area* and is looking inside that area. In "open-view" situations, the observation ONLY furnishes the officer with probable cause to seize the contraband. The *Adoue* Court stated at P-647 that, *"either he must*

obtain a warrant or an exception to the warrant requirement must exist to justify his entry into the protected area and his seizure." [Emphasis added].

Chief Justice Sandberg in his concurring opinion crystalized the law in stating,

> "When a police officer stands outside a vehicle or structure and looks inside, his constitutionally permissible observation *ONLY* gives rise to a basis for probable cause, which he can then utilize in securing a warrant." *Adoue, supra,* at P-649 citing with approval *Coolidge vs. New Hampshire,* 403 U.S. 443, 468 (1971) [Emphasis added].

The Chief Justice further added at P-649 that, "in the case of fixed premises, the additional requirement needed for entry, in absence of any exigent circumstances, is a warrant." See *Steele vs. United States,* 267 U.S. 428 (1925), and *Taylor vs. United States,* 286 U.S. 1 (1932).

It is clear from the facts *sub judice* that the officers viewed the Appellants from across the canal using Star-Bright binoculars after several hours of surveillance. These actions and facts give rise to an "open-view" situation. The Court in *Ensor* and *Adoue, supra,* held that an open-view situation exists under the circumstances of those respective cases. However, in both of the aforementioned cases and in EVERY case cited which sustains an "open-view" seizure without a warrant, there must exist a well-recognized exception to the warrant requirement. In *Ensor* and *Adoue, supra,* as well as *Albo vs. State,* 379 So. 2d 648 (Fla. 1980), the doctrine of *Carroll vs. United States,* 267 U.S. 132

(1925), was held to be applicable because of the motor vehicle, movable or exigent circumstance exception to the warrant requirement. The Court in *Adoue, supra*, acknowledged at P-647 a necessary difference between the search of a structure where a warrant normally must be obtained and the search of a vehicle where, because of the inherent mobility of the vehicle, it is not practical to secure a warrant.

It is respectfully submitted that given the findings by the trial court that there were no exigent circumstances, that the premises searched was a home, that the officers were presented with a "open-view" as opposed to "plain-view" situation, the subsequent warrantless intrusion on to the Defendant's premises was constitutionally impermissible and violative of the Appellants rights guaranteed them by the Fourth Amendment to the United States Constitution in Article I, Section 12 of the Florida Constitution.

The Appellants herein respectfully suggest that the Court of Appeals, Fourth District, may have entered an erroneous order in light of the subsequent ruling in *Adoue, supra*, and other case authorities referred to herein. The Appellants now submit their Petition for Rehearing to aid the Court in its decision-making process. The Appellants ask this Court to set forth its reasons, at least briefly, so that:

(1) all counsel and lower courts will know whether this Court approved or disapproved of what happened at the Motion of Suppress hearing below and be guided appropriately in the future;

(2) defense counsel can explain to his client and his family why he lost this appeal;

(3) the entire Court of Appeals can understand the panel's decision and judge whether an *en banc* rehearing is advisable;

(4) the Florida Supreme Court can monitor the work of the Court of Appeals and exercise its own discretion where appropriate;

(5) the United States Supreme Court can likewise have the information necessary to perform its function;

(6) any federal court reviewing on habaes corpus can know the thinking of this Honorable Court, and thus pay its appropriate deference to it; and

(7) the Bar and the public in general can assess the work of this Court and its Judges.

The Appellants ask this Court to render a written opinion in light of *Adoue, supra*, and other case authorities referred to herein and as a matter of courtesy, fairness and as common-law tradition. See generally, *N.L.R.B. vs. Amalgamated Cloth Workers of America, AFL-CIO, L. 990*, 430 F.2d 966, 972 (5th Cir. 1970). Appellants also contend that it is required to do so in the instant case as a matter of due process of law and in fulfillment of the right to access to all courts, as guaranteed by Article I, Sections 9 and 21, and Article V of the Constitution of the State of Florida and by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Based upon the foregoing citations of authority and principles of law, it is respectfully submitted that the Trial Court's Order denying the Appellants' Motion to Suppress be reversed with directions to enter an Order granting said Motion and discharging the Appellants herein.

Respectfully submitted,

MICHAEL H. BLOOM, P.A.
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Telephone: 305/854-1531

BY: /s/ Michael H. Bloom
MICHAEL H. BLOOM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 17th day of December, 1981, to Max Rudman, Assistant Attorney General, Department of Legal Affairs, Office of the Attorney General, Palm Beach County, Regional Service Center, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401; and Hy Shapiro, Esquire, 950 South Miami Avenue, Miami, Florida 33130.

/s/ Michael H. Bloom

[RECEIVED JAN 27 1982]

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 80-1449

RONALD E. SPEED
RUSSEL FRANCIS KEARNEY and
DONALD JAY WILLIAMS,

Appellant,

v.

STATE OF FLORIDA

Appellee.

January 27, 1982

BY ORDER OF THE COURT:

ORDERED that Appellants' December 18, 1981 Motion for Rehearing and/or Clarification of Decision is denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
CLYDE L. HEATH,
CLERK.

cc: Michael H. Bloom, Attorney
Hy Shapiro, Attorney
Max Rudmann, Assistant Attorney General

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